In The

Supreme Court of the United States

October Term 1974

Supreme Court U. S.
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MICHAEL RODAK, JR., CLERK

No. 73-1977

ALYESKA PIPELINE SERVICE COMPANY,

Petitioner,

vs.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

This brief *amicus curiae* addresses the merits of the questions raised in the above-stated Writ of Certiorari. The Association of the Bar of the City of New York files this brief pursuant to Rule 42 of the Rules of the United States Supreme Court. Both petitioner and respondents have consented to the filing of this brief and copies of the consents of petitioner and respondents have been filed with the Clerk of this Court.

INTERESTS OF THE *AMICUS CURIAE*

The Association of the Bar of the City of New York ("The Association") has a membership of some 10,500 attorneys admitted to practice in New York and elsewhere. The Association was established by Act of the New York State Legislature in 1871. Laws 1871, Chapter 819; Amended Laws 1924, Chapter 134. Its stated statutory purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof."

Much of The Association's membership serves on specialized committees which are designed to make professional contributions in their special fields in furtherance of The Association's purposes. Among the committees with an interest in the issues presented in this Writ of Certiorari is The Association's Committee on Environmental Law, which has examined the issue on appeal herein and requested and approved the preparation of this brief *amicus curiae*. The Executive Committee of The Association has authorized the filing of this brief on behalf of The Association.

The Association believes that this Writ of Certiorari raises important implications for the hearing of environmental causes in federal courts. The central issue reviewed here is how this Court will delineate the private attorney general doctrine.

Without affirmation of the doctrine, this Court's salutory refinements in the field of standing[1] to litigate environmental rights are substantially impaired; those non-economic interests which possess a stake sufficient to sue, frequently lack the necessary financial resources simply because they are non-economic interests. A single citizen rarely has the financial capacity or willingness to vindicate environmental laws protecting widely shared resources.

The equitable foundation of the private attorney general doctrine guides its application: where a Court finds that a citizen has served as a private attorney general, fairness requires that the citizen's expenses, including attorneys' fees, in effectuating a federal law be reimbursed. Similarly, fairness requires that such expenses be paid by the party which the Court finds responsible for frustrating the given federal law's effectuation.

The Court of Appeals below was aware of these implications: ". . . our decision today may increase the willingness of skilled lawyers throughout the nation to undertake public interest litigation on behalf of unmonied clients with just, lawful, and important claims. This proposition we of course accept, and count it a happy result of our decision." *The Wilderness Society, et al. v. Morton*, 495 F.2d 1026, 1038 n. 9 (D.C. Cir., April 4, 1974).

This brief reviews the appropriateness of the private attorney general doctrine as applied to environmental law suits and the extent in equity of its application.

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1. *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973).

SUMMARY OF ARGUMENT

The "private attorney general" is a citizen acting to enforce public policy. Equity permits an award of expenses including attorneys' fees to such a citizen when his actions effectuate a provision of the Constitution or a strong congressional policy.

This award of counsel fees is particularly appropriate in environmental litigation where citizens acting to enforce laws to protect the nation's natural resources frequently vindicate substantial public rights benefiting a broad population.

Where governmental officials do not effectuate public policy but for action by a private attorney general, the award of expenses is both just and necessary. The citizen assumes a real burden but seeks no pecuniary reward. His concrete interests, which gave him standing to sue, usually are non-economic and he can ill afford the expenses to which he has been put.

Where the elements of the private attorney general doctrine are met, the award of expenses should include all costs reasonably related to effectuating the policy, not merely those involving litigation. The measure for computing fees should be the fair market value of the services.

28 U.S.C. §2412 need not be a bar against assessing attorney's fees against the United States. Congress passed §2412 to promote fairness to those litigating with the federal government primarily for money claims. In so doing, it adopted the common law "American" rule including the equitable exceptions thereto. It is fair and just to award fees against the United States.

ARGUMENT

POINT I

THE PRIVATE ATTORNEY GENERAL DOCTRINE PROVIDES AN EQUITABLE BASIS FOR COMPENSATING CITIZENS SEEKING JUDICIAL ENFORCEMENT OF CONSTITUTIONAL OR IMPORTANT LEGISLATIVE POLICIES.

The worth of the private attorney general doctrine in American jurisprudence is amply demonstrated. The doctrine is of such proven importance that this Court should embrace it and delineate its elements to reconcile differences in the case law.[2]

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2. This Court in *Hall v. Cole*, 412 U.S. 1 (1973), alluded to the "private attorney general" theory but did not rule with respect to it. It noted in *F.D. Rich Co. v. Industrial Lumber Co.*, 40 L. Ed. 2d 703 at 714 (1974) that whether counsel fees could be awarded to a private attorney general remained an undecided issue.

The 2nd and 4th Circuits have declined to honor the private attorney general doctine. See, *e.g.*, *Bridgeport Guardians Inc. v. Members of Bridgeport Civil Service Commission*, 497 F.2d 1113 (2d Cir. 1974); *Bradley v. School Bd. of City of Richmond*, 472 F.2d 318 (4th Cir. 1972), *rev'd on other grounds*, 416 U.S. 696 (1974). The District of Columbia Circuit and the 1st, 3rd, 5th, 6th, 7th, 8th and 9th Circuits plus some 24 district courts have accepted and applied the private attorney general doctrine. See, *e.g.*, *Knight v. Auciello*, 453 F.2d 853 (1st Cir. 1972) and *Natural Resources Defense Council v. Environmental Protection Agency*, 484 F.2d 1331 (1st Cir. 1973); *Skehan v. Bd. of Trustees of Bloomsburg State College*, 501 F.2d 31 (3rd Cir. 1974); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Milburn v. Huecker*, 500 F.2d 1279 (6th Cir. 1974); *Donahue v. Staunton*, 471 F.2d 475 (7th Cir. 1972), *cert. denied*, 410 U.S. 955 (1973); *Fowler v. Schwarzwalder*, 498 F.2d 143 (8th Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974).

Among the best known applications of the doctrine to environmental causes by district courts is *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972). See also *Delaware Citizens for Clean Air v. Stauffer Chemical Co.*, 62 F.R.D. 353 (D. Del. 1974).

A synthesis of the evolution of the private attorney general doctrine in case law reveals several elements which should be considered in the exercise of judicial discretion when a Court is asked to award counsel fees based upon the doctrine:

1. The vindication of a substantial legal right arising under federal law. Such includes any one of the following:

> a. The effectuation of any provision of the Constitution of the United States of America;
>
> b. The effectuation of a strong congressional policy. Strong may be construed as being of substantial importance in light of (i) the major public policies as declared in legislative findings embodied in a law's legislative history, (ii) the function of the law as an integral part of a legislatively-framed regulatory scheme, (iii) the substantial injury which would result to the citizenry or any class of citizens whose interests are protected by the law.

Effectuation in each instance must be judged in terms of the law being duly implemented by the officials sued whenever such occurs and not merely because a party wins, settles or loses a lawsuit or administrative proceeding in the attempt to secure effectuation.

2. The failure of administrative officials to honor a substantial legal right and/or press for its effectuation.

3. The extent of the public benefit realized by the effectuation.

4. The financial or other burden assumed by the citizen in securing the effectuation. This element should include all aspects of the citizen's undertakings which directly relate to securing effectuation and not merely the expenses and counsel fees involved in any final court ruling which requires effectuation especially in comparison with the often substantial economic resources and expertise of governmental bodies and private corporate party defendants.

5. The presence of any special circumstances which would render unjust an award of expenses and attorneys' fees.

The availability of counsel fees, where justified by these elements, is crucial to assuring that individuals injured by a failure to effectuate a federal law are encouraged to seek judicial relief. Equity supplies here what a statutory scheme may not as yet provide. See Note, *Allowance of Attorney Fees in Civil Rights Litigation Where the Action Is Not Based on a Statute Providing for an Award of Attorney Fees*, 41 Cinn. L. Rev. 405 (1972). As discussed below, the private attorney general doctrine is particularly apt in environmental suits.[3]

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3. Indeed the success of environmental litigation has spawned several statutes expressly providing attorneys' fees in environmental litigation. In environmental laws adopted since 1970, Congress has come to recognize the need to provide for counsel fees: water act citizen suits, P.L. 92-500 §505; 33 U.S.C. §1151 *et seq.*; clean air act citizen suits, P.L. 91-604 §304, 42 U.S.C. §1857, *et seq.*; noise control act citizen suits, P.L. 92-574 §12. Other jurisdictions have come to the same conclusions, see *e.g.*, Air Pollution Control Code, Administrative Code of The City of New York, Ch. 57, Part 2; Local L. No. 14, 1971, as amended, and Noise Code, Administrative Code of The City of New

(Cont'd)

In a recent civil rights ruling awarding attorneys' fees, the 6th Circuit Court of Appeals observed in *Taylor v. Perini*, 503 F.2d 899 at 905 (6th Cir. 1974):

> "Awarding attorneys' fees in cases where there is no potential substantial award of damages and where the cost of supporting a case for injunctive relief is high serves to prevent unjust discouragement of parties in bringing suits to vindicate important rights. *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974) (en banc)."

Equity is not given in halves. Where the Constitution allows suit because of the "concrete adverseness" of the parties [4] and that suit effectuates a constitutional or strong legislative policy, the private attorney general in fairness should be compensated for his expenses and fees.

(Cont'd)

York, Ch. 57, Part 3; Local L. 57, 1972, authorizing awards of counsel fees. The importance of awarding fees to encourage effectuating environmental laws has been legislatively recognized since 1970, the year of the first "Earthday," but even where no statutory scheme exists, as with NEPA (adopted before 1970), the encouragement is needed.

4. *Flast v. Cohen*, 392 U.S. 83, 99 (1967).

POINT II

THE PRIVATE ATTORNEY GENERAL DOCTRINE SHOULD APPLY TO ENVIRONMENTAL LITIGATION SINCE CITIZEN SUITS ARE OFTEN THE ONLY MEANS OF ENSURING EFFECTUATION OF ENVIRONMENTAL PROTECTION LAWS.

A. The Necessity of Citizen Environmental Suits Is Established.

Over the past decade, protection of the environment has newly emerged as a principal task of government. The need for such protection initially was pressed and recognized in federal courts. Laws previously enacted have been reconstrued in terms of the public purposes served by environmental protection.[5] New laws have been adopted touching every aspect of environmental protection.[6]

The enactment in 1969 of the National Environmental Policy Act, 42 U.S.C. §4321 ("NEPA"), actually was anticipated in 1965 by the ruling in *Scenic Hudson Preservation Conference*

5. See, for instance, the interpretation of "dike" in *Citizens Committee v. Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*., 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970); or of the Mineral Leasing Act of 1920, 30 U.S.C. §181, *et seq*., treated on the merits in the instant case, *The Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973).

6. In addition to the pervasive National Environmental Policy Act, 42 U.S.C. §4321, water, 33 U.S.C. §1151, air, 42 U.S.C. §1857, noise, P.L. 92-574 and a host of other laws exist. See generally, *Statutory and Administrative Materials*, IV, Environmental Law Reporter, 40,000, *et seq*.

v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The Court required an environmental protection review under the Commission's existing authority.[7] Judicial recognition of environmental injuries has prompted much remedial legislation; in the instant case, it was after the plans for the Trans-Alaska Pipeline were revised to assure environmental protection that Congress authorized the pipeline's construction, and only then with special provisions for "environmental protection."[8]

7. In *Scenic Hudson*, 354 F.2d 608 at 624, the Court noted that on remand the renewed proceedings of the Federal Power Commission "must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered. The record as it comes to us fails markedly to make out a case for the Storm King project on, among other matters, costs, public convenience and necessity, and absence of reasonable alternatives." Compare this judicial mandate with the legislative command of NEPA which requires in 42 U.S.C. §4332 that *all agencies* of the federal government:

> "(B) identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economical technical considerations; [and] . . . (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . (iii) alternatives to the proposed action."

8. See amendments to the Mineral Leasing Act of 1921 in P.L. 93-153, 87 Stat. 576, §28(h)(2):

> "(2) The Secretary or agency head, prior to granting a right-of-way or permit pursuant to this section for a new project which may have a significant impact on the environment, shall require the applicant to submit a plan of construction, operation, and rehabilitation for such right-of-way or permit which shall comply

(Cont'd)

Environmental laws have required effectuation by citizen suit either because the laws themselves lack self-enforcement mechanisms or because the interests protected are so broad that governmental officials neglect them.

The importance of citizen action as an enforcement mechanism is well illustrated by NEPA, which required all federal agencies to determine the environmental consequences of government action but was silent as to the results of their failure to do so. Only citizens affected by that failure could ensure that NEPA's policy would be implemented. Indeed NEPA may have contemplated this in recognizing that "each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. §4331(c).

(Cont'd)

> with this section. The Secretary or agency head shall issue regulations or impose stipulations which shall include, but shall not be limited to: (A) requirements for restoration, revegetation, and curtailment of erosion of the surface of the land; (B) requirements to insure that activities in connection with the right-of-way or permit will not violate applicable air and water quality standards nor related facility siting standards established by or pursuant to law; (C) requirements designed to control or prevent (i) damage to the environment (including damage to fish and wildlife habitat), (ii) damage to public or private property, and (iii) hazards to public health and safety; and (D) requirements to protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife, and biotic resources of the area for subsistence purposes. Such regulations shall be applicable to every right-of-way or permit granted pursuant to this section, and may be made applicable by the Secretary or agency head to existing rights-of-way or permits, or rights-of-way or permits to be renewed pursuant to this section."

Indeed, the agency overseeing implementation of NEPA, the Council on Environmental Quality ("CEQ") early endorsed such citizen action. Russell E. Train as Chairman of the CEQ stated in 1970 that "In our view, and in the view of our Legal Advisory Committee, private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs."[9]

However, suits supplementing government programs have not proven sufficient. The neglect by government officials of broad environmental interests too frequently results in frustrating a constitutional or statutory provision and injuring the protected interests. Citizens cannot rely on the Department of Justice to compel effectuation of such a provision because the Department is defending the very officials which have defaulted in their duty.[10]

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9. Letter dated September 30, 1970, by Russell E. Train, Chairman, C.E.Q., to Randolph W. Thrower, Commissioner, Internal Revenue Service, urging the IRS to rule eligible under Section 501(c)(3) of the Internal Revenue Code those entities which may pursue environmental protection goals through litigation. The IRS subsequently determined in favor of eligibility.

10. See Note, 58 Cornell L. Rev. 1222 at 1244, discussing *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972)

> "The court found that public-interest actions by concerned citizens are inherently valuable. Indeed, the court argued that private policing actions become a virtual necessity when the public officials charged with protecting the public's environmental rights ignore their constitutional or statutory duties."

When citizens sue to vindicate an environmental right, they undertake a public calling. The rights are not easily quantifiable in money terms and no single citizen usually has a sufficient economic stake in environmental protection of wildlife, public lands, rivers or air to motivate him to underwrite the entire suit. The benefits from such suits accrue to all the people.

The standing which citizens have been granted in order to bring environmental suits may be of little value if they must bear the whole financial burden of vindicating environmental rights. The award of counsel fees may be necessary to assure that the public interest will be adequately represented during the effort to secure effectuation, *Greene County Planning Bd. v. F.P.C.*, 455 F.2d 412, 426 (2d Cir. 1972). However, this may be, it is certainly the case that attorneys' fees should be awarded after successful effectuation, regardless of who "wins" the lawsuit.

B. The Public Benefits From Vindicating Environmental Rights Are Substantial.

The validity of these general conclusions is established by repeated judicial determinations where citizens vindicate environmental rights. Each of the following cases illustrates the public benefits achieved by citizens. In three instances, citizens sued through their local government; in the balance, through non-governmental civic societies. In none were money damages sought, and each imposed a substantial litigation burden on the plaintiffs.

1. Land Use

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), a public park was saved from being bisected by a highway which would have destroyed a substantial portion of the park. The Court found the Secretary of Transportation had acted in violation of the Department of Transportion Act of 1966[11] and the Federal-Aid Highway Act of 1968.[12] This Court declared that "protection of parkland was to be given paramount importance," 401 U.S. at 412, reinforcing the congressional mandate that public parks not be destroyed if feasible and prudent alternatives exist.

In *Minnesota Public Interest Research Group v. Butz*, 358 F. Supp. 584 (D. Minn. 1973), the Court enjoined the logging and sale of timber from virgin forests in the Boundary Waters Canoe Area under the National Wilderness Preservation System Act of 1964[13] until a Management Plan and environmental impact statement were prepared. It thereby effectuated Congress' intent to minimize environmental damage.

In the instant case, itself, *Wilderness Society v. Hickel*, 325 F. Supp. 422 (D.D.C. 1970), the Court ensured that NEPA would be followed in governmental approval of a pipeline which would transgress the nation's largest untrammelled public lands. In *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir. 1973), *cert. denied*, 411 U.S. 917 (1973), the issuance by the Secretary

11. 49 U.S.C. §1653(f).

12. 23 U.S.C. §138.

13. 16 U.S.C. §1131.

of the Interior of rights-of-way to build the pipeline was successfully challenged because of his violation of the language and the existing policy of the Mineral Leasing Act of 1920[14] and the Bureau of Land Mangement's regulations.

Although compliance with NEPA was not involved in the decision of the Court of Appeals, 479 F.2d 842, that federal law had been substantially effectuated by the suit.

2. Pesticides

Despite the known hazards of DDT, both the Secretary of Health, Education and Welfare and the Secretary of Agriculture refused to suspend its use. As a result of their inaction, the Environmental Defense Fund litigated in the public's behalf. *Environmental Defense Fund v. United States Department of Health, Education and Welfare*, 428 F.2d 1083 (D.C. Cir. 1970); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

The Courts found that continued governmental approval of the use of DDT, despite its hazardous nature, was contrary to law[15] and ordered that its use be discontinued pending scientific study and public hearings.

14. 30 U.S.C. §185 (1970).

15. 1958 Amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. §301 *et seq.* and Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §135 *et seq.* (1964).

3. *Water*

Many cases have sought to preserve the natural beauty and aquatic resources of the Hudson River, one of our nation's most beautiful waterways called by Mr. Justice Holmes more than an amenity, a "treasure."[16]

One suit was initiated because the Federal Power Commission issued a license to Consolidated Edison Company of New York, Inc. to construct a pumped storage hydroelectric project on the Hudson River at Storm King Mountain without considering recreational uses, including scenic beauty, as obligated to do under the Federal Power Act.[17] *Scenic Hudson Preservation Conference* v. *Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

A second challenged a permit granted by the Army Corps of Engineers to New York State to fill a section of the Hudson River to build a proposed Hudson River Expressway. In *Citizens Committee for the Hudson Valley* v. *Volpe*, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd.*, 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1970), the District Court found that the Corps of Engineers had exceeded its authority in issuing the permit in violation of the Rivers and Harbors Act of 1889.[18] The consent of Congress was required.

16. *New Jersey* v. *New York*, 283 U.S. 336 at 342 (1931): "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."

17. 16 U.S.C. §791(a) *et seq.*

18. 33 U.S.C. §401.

The refusal of the executive to allot full sums authorized to be appropriated by Congress to municipal sewage treatment projects was challenged by citizens suing through their local government. *City of New York* v. *Train*, 394 F. 2d 1033 (D.C. Cir. 1974) affirming *City of New York* v. *Ruckelshaus*, 358 F. Supp. 669 (1973). The Court found that the Environmental Protection Agency Administrator was in violation of the Federal Water Pollution Control Act Amendments of 1972[19] and directed allotment of the full sums authorized by Congress. These suits effectuated Congress' intent to eliminate discharge of pollutants into the nation's navigable waters.

4. *Air*

Cleaning the nation's air received high priority in the Clean Air Act Amendments of 1970.[20] Despite Congress' intent "to protect and enhance the quality of the Nation's air,"[21] the Environmental Protection Agency issued a regulation[22] which would have permitted degradation of clean air. Citizen suit ensured that the intent of Congress would not be so blatantly disregarded. *Fri* v. *Sierra Club*, 412 U.S. 541 (1973).[23]

19. 33 U.S.C. §1251 *et seq.*

20. 42 U.S.C. §1857 *et seq.*

21. 42 U.S.C. §1857, §101(b).

22. 40 C.F.R. 51.12(b).

23. Although new regulations from the U.S. Environmental Protection Agency have raised anew the issue of non-degradation of the nation's clean air resources.

5. Environmental Protection — NEPA

In *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), the Court ruled that NEPA required the Atomic Energy Commission to make a fully independent evaluation of environmental impact. See also *Scientists Institute for Public Information v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973).

In *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972), the court found that NEPA requires that federal agencies consider environmental values at every stage of their deliberations. Further, each agency has a primary and non-delegable responsibility for compliance with NEPA and could not abdicate its duties by using an environmental impact statement prepared by a nonfederal agency. This teaching is re-emphasized in *Conservation Society v. Secretary*, — F.2d — (2d Cir. Dec. 11, 1974, Docket 73-2629).

Further implementation of NEPA resulted in protecting the aesthetic, recreational, marine and wildlife resources of the Gulf of Mexico when suit was brought against the Secretary of Interior to enjoin him from entering an oil and gas general lease sale of submerged lands off eastern Louisiana. *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

The pattern of these cases can be repeated many times over. While a Court may not find it appropriate to apply the private attorney general doctrine in every instance to cases such as those described here, the general aptness of the doctrine is plain. This

Court should provide that environmental as well as civil rights and other public rights litigation is the genre for which the doctrine in the main exists.

POINT III

THE CRITERIA OF EXPENSES AND COUNSEL FEES UNDER THE PRIVATE ATTORNEY GENERAL DOCTRINE SHOULD BE THE MARKET VALUE THEREOF.

Once a Court rules that a citizen has served as a private attorney general, all expenses reasonably related to securing effectuation of the federal law should be reimbursed. These normally might include participation in and exhausting administrative proceedings prior to suit and the preparation for and prosecution of the suit itself.

Expert witness fees and expenses should be allowed, especially where, as in environmental causes, complex scientific or technical problems of proof are presented.[24] Since the expert and administrative costs can be quantified, they should be reimbursed.

Counsel fees also should be reimbursed. Here the issue, in proper cases, is not so much whether to reimburse, but in what amount.

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24 As was observed by the trial court in *La Raza Unida v. Volpe*, 57 F.R.D. 94, 102 (N.D. Cal. 1972): "The affidavits of the expert witnesses were quite helpful to the Court, and were a crucial part of the plaintiff's presentation."

The District of Columbia Circuit below sensibly ruled that the award of counsel fees should be based on the fair market value for the legal services rendered.[25] Courts should not engage in law office management to fix a fee otherwise.

This reasonable formula contrasts with the ruling in the First Circuit that counsel fees should be awarded at less than a fair market fee. In *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 484 F.2d 1331 at 1337 (1st Cir. 1973), the court held, after its ruling on the merits described above, 478 F.2d 875, that:

> "Petitioners are not a public agency and are legally responsible to no one but themselves. We must satisfy ourselves that the taxpayers' money will not be used to support needless or excessive legal items. . . . As attorneys for involuntary

25 "The fee award need not be limited, however, to the amount actually paid or owed by appellants. It may well be that counsel serve organizations like appellants for compensation below that obtainable in the market because they believe the organizations further a public interest. Litigation of this sort should not have to rely on the charity of counsel any more than it should rely on the charity of parties volunteering to serve as private attorneys general. The attorneys who worked on this case should be reimbursed the reasonable value of their services, despite the absence of any obligation on the part of appellants to pay attorneys' fees . . . . It is our view that the award must go to counsel rather than to the organizations which pay their salaries . . . . This is sound, whether such organization is a litigating party or a public interest law firm or defense fund . . . and we revert to the possibility that the salary they previously received represented less than they could have earned on the market in the absence of their dedication to the public interest." *Wilderness Society v. Morton*, 495 F.2d 1026 at 1037 (D.C. Cir. 1974).

> clients, their fees may properly be less than those they would have received by entering the marketplace and selling their services to the private client who would make the highest bid for them."

In this suit *against* the Environmental Protection Agency to force implementation of the Clean Air, a *"pro bono"* reduced rate of $30 an hour for private counsel, and a pro rata share of the salaries of staff counsel for the Natural Resources Defense Council, Inc. were fixed.

In the Second Circuit, without a written opinion, the same formula was used in *Hudson River Fishermen's Association v. Federal Power Commission*, — F.2d — (2d Cir., 1974) (Docket Numbers 73-2258 and 73-2259) (a suit under 16 U.S.C. 803(a) and NEPA). The trial court in *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex., San Antonio Div., 1973), *rv'd on other grounds*, 504 F.2d 43 (5th Cir., 1974), *rehearing den.* 504 F.2d 760 (5th Cir., Nov. 19, 1974, en banc), adopted the fee schedule of the Criminal Justice Act, 18 U.S.C. 3006A(d).

The only fully equitable test is not any one of these formulae. Any equitable formula must be framed uniformly. It should remain that which is reasonable in the circumstances guided by the following considerations:

a. Market costs for attorneys' fees (including their overhead) in the community where the forum is located.

b. The hours devoted by counsel and any special skills required.

c. The fair value of para-legal assistance and overhead and expert witness and consultants services provided to make the legal representation possible.

d. The services rendered, including counsel's success in asserting different legal contentions, the relationship of those contentions to the federal law effectuated, and the benefits conferred by enforcing the law.

POINT IV

EQUITY MAY AWARD ATTORNEYS' FEES AGAINST THE UNITED STATES AND ITS AGENCIES.[26]

The private attorney general doctrine only achieves its equitable end of making the plaintiff whole if the expenses and attorneys' fees can in fact be paid.

Where local government, *e.g. Bradley v. School Bd. of Richmond*, 53 F.R.D. 28 (E.D. Va. 1971), 472 F.2d 318 (4th Cir., 1972), *vacated and remanded*, 416 U.S. 696 (1974), or state agencies, *e.g. Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala., 1972) are sued, courts have taxed them to reimburse the private attorney generals.

The instant case raises a troubling aspect of how the doctrine is to be applied. Alaska, an intervening defendant, had not been found responsible for frustrating federal law and was

26. If this Court rules that a Court sitting in equity cannot award counsel fees against the United States, the only remedy for the inequity which results is a congressional amendment to recognize the common law doctrine of the private attorney general. For the reasons here stated, further legislation is not required.

not taxed. Alyeska, similarly situated like Alaska, was taxed. The United States Department of the Interior, whose officials were deemed responsible for frustrating the federal policy, was not taxed because of 28 U.S.C. §2412.

However, equity is not served by a doctrine which unfairly taxes private applicants which are *not* found to have unduly influenced or caused the government officials' improper acts. If Alyeska is not to be taxed, is the United States immune as assumed below?

La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal., 1972), escaped the dilemma raised here by taxing the State. In *Sierra Club v. Lynn*, 364 F. Supp. 834 (W.D. Tex., San Antonio Div., 1973) fees were assessed against the private developer and the unfairness of this ruling caused its reversal on appeal, 504 F.2d 43 (5th Cir., 1974).

Where a federal defendant frustrates federal law, the award of expenses under the private attorney general doctrine should be taxed against the United States. Although lower courts have neglected serious study of 28 U.S.C. §2412, the equities of an award in the instant case require review of the equitable grounds for ruling that 28 U.S.C. §2412 is not a bar to an award.

The question of awarding attorneys' fees against the United States was but briefly considered by the Court below:

> ". . . Under 28 U.S.C. §2412, however, no attorneys' fees can be imposed against the United States. . ." 495 F.2d at 1036.

More consideration should be given to its purpose; and equitable aspects should be thoroughly examined.

A. The History of 28 U.S.C. §2412 Shows No Restriction on Equitable Exceptions to the "American Rule."

Historically, the sovereign has been immune from suit. Traditionally, with rare exceptions such as those now before this Court, awards of attorneys' fees in Federal courts have been denied to successful litigants — *i.e.*, the "American" rule.

As a matter of fairness, primarily for damage claims, sovereign immunity was waived by Congress. However at the time Congress waived immunity, it did not permit awards of fees or costs. The *former* statute, passed in 1948, read:

> "(a) The United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." (former 28 U.S.C. §2412, 62 Stat. 973, June 25, 1948).

Inequality resulted. No award of costs could be had *against* the United States, but, if successful, the United States could be awarded costs.

So, in 1966, Congress amended §2412:

> "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or official of the United States acting in his official capacity, in any court having jurisdiction of such action . . ." (P.L. 89-507, July 18, 1966).

The purpose of this amendment was ultimate fairness: to put the United States on an equal footing with other litigants. The purpose was not to prohibit attorneys' fees in unusual situations, because the "American" rule made it unnecessary for Congress to examine awards of attorneys' fees in suits for money judgments in claims against the United States.

The legislative history of the 1966 amendment shows that Congress' desire for fairness was a two-way street. Although the reasons can be inferred, the legislative history does not explicitly state why awards of attorneys' fees were — in words, if not in spirit — disallowed.

Senate Report No. 1329 speaks to the issue of fairness:

> ". . . [these bills] are intended to improve the procedures for disposition of claims by and against the Government. These four bills have the common purpose of amending the law to incorporate features which will provide for a more fair and equitable treatment for the private individual or claimant when he must deal with the Government.

> ". . . this bill will provide for uniformity of treatment in the award of costs. Apparently the present inequality is related to a governmental advantage derived from the principle favoring immunity of the sovereign from suit. *Under modern conditions, there is no reason for this advantage when the law provides for suit against the Government.*" 1966 U.S. Code Cong. & Admin. News 2527 at 2528. (Emphasis supplied.)

Although the Report said that there was no change as to attorneys' fees, this was probably because Congress knew that the "American rule" applied generally, and there was no need to reconsider it or its equitable exceptions. Fairness to litigants with money claims against the United States was the only issue. How often, if ever, could a *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939) fund situation be anticipated in government litigation? Suits customarily had been for damages; judicial recognition of non-econonmic interests sufficient to confer standing to sue remained several years away. Congress understandably had no occasion to probe the matter deeply.

In short, it appears that Congress simply sought to codify the common law rule on attorneys' fees, including its several equitable exceptions. Congress did not abridge the Court's authority to award attorneys' fees in equity proceedings.

28 U.S.C. §2412 has not been a complete bar to awards of attorneys' fees. *Thorn v. Richardson*, 4 C.C.H. Employment Practices Decisions, Para. 7630, at 5489-5492 (W.D. Wash., Dec. 10, 1971). The evolution of §2412 was also noted in *dicta* in

Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 484 F.2d 1331, at 1335, note 3 (1st Cir. 1973):

> "The legislative history provides no clues concerning Congress' reasons for broadly excluding awards of attorneys' fees. Such a result might seem to be inconsistent with the express desire to eliminate the 'unfair' advantage possessed by the United States by virtue of its sovereign immunity. At the time of the enactment, however, the award of fees was still rare in American law and was often disfavored by the courts. *See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967). The omission may simply have been a reflection of the prevailing American rule, preserving to Congress the option of reversing the rule when justice required."

The First Circuit had no need further to consider §2412, for it found the necessary Congressional authorization for fees in the Clean Air Act itself. By analogy, unless expressly curbed by Congress, comparable authorization persists in equity. Cf. The similar construction discussed in *Pyramid Lake Paiute Tribe v. Morton*, 360 F. Supp. 669, 670-71 (D.D.C., 1973).

B. The Court's Equitable Power Permits Awards of Attorneys' Fees Against the United States.

Equity has the power to promote the fairness suggested by the legislative history of 28 U.S.C. §2412 in accordance with the development of the common law awards of attorneys' fees under such equitable exceptions to the "American Rule" as the private attorney general doctrine.

Courts of equity have broad jurisdiction to make and enforce orders to protect the public interest and effectuate statutory purposes. As stated in *Mitchell v. DeMario Jewelry*, 361 U.S. 288 (1960):

> ". . . [Congress] must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature' *Clark v. Smith*, 13 Pet. 195, 203."

This Court has declined to find that Congress restricts equity authority by implication. *Renegotiation Board v. Bannercraft Clothing*, 42 U.S.L.W. 4203 (1974). See also *Porter v. Warner Co.*, 328 U.S. 395 (1946).[27]

27. This Court's "equitable jurisdiction is not to be denied or limited in the absence of *a clear and valid legislative command*. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395 at 398 (1946) (emphasis added). At issue of course, is whether the "legislative command" of §2412 included the equitable exceptions to the American Rule.

A question of statutory interpretaion of intent arose in *Beley v. Naphtaly*, 169 U.S. 353 (1898). There, this Court construed a statute in accord with what it believed had been Congressional intent:

> "The Act of Congress should not be so construed as to except from its remedial powers those who were without an actual grant while at the same time filling every other requirement of the Act, unless the language of the Act is open to no other interpretation.
>
> "'Such a construction ought to be put upon a statute *as will best answer the intention which the makers had in view. . . .*'" (Emphasis supplied.) *Cf. Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

See also *The Allocation of Attorneys' Fees after Mills v. Electric Auto-Lite Co.*, 38 U. Chic. L. Rev. 316 (1971).

In the case of §2412, the intention was *fairness*. It was expressed in the best manner Congress knew at the time. Furthering that intention means that the "American" rule, as it develops with its equitable exceptions, is to be applied in actions involving the United States and its agencies.

The situation is analogous to Civil Rights Act and Clean Air Act rulings, where the courts found a basis for assessing attorneys' fees against the United States without express provision in the statutes. Here, where a citizen's "concrete

adverseness"[28] gives him standing to sue and he satisfies the private attorney general elements, equity should also embrace an award against the United States. The United States and its agencies are subject to a court's equitable injunctive orders. They are likewise subject to equitable awards of attorneys' fees.

28. *Flast v. Cohen, supra.*

CONCLUSION

This Court should recognize and delineate the private attorney general doctrine as set forth above, and the doctrine should be deemed applicable to environmental litigation.

It is inherently unfair to burden a private attorney general for successfully effectuating a Congressional policy without reimbursing him for his attorneys' fees and other expenses. It is similarly unfair to assess fees wholly against a private party when a federal official is at fault. The fees should be assessed against the United States as well.

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